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No. 74

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Supreme Court of the United States

October Term, 1959

AMERICAN TRUCKING ASSOCIATIONS, INC.; THE CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC.; NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION; CONVOY COMPANY; ROBERTSON TRUCK-A-WAY, INC.; HAINLEY AUTO TRANSPORT, E. & H. TRUCKAWAY; WESTERN AUTO TRANSPORT, INC.; and KENDRA AUTO TRANSPORT CORP. APPELLANTS

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; PACIFIC MOTOR TRUCKING COMPANY; and GENERAL MOTORS CORPORATION

On Appeal from the United States District Court
for the District of Columbia

**WRIT FOR THE INTERSTATE COMMERCE
COMMISSION**

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v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; PACIFIC MOTOR TRUCKING COMPANY; and GENERAL MOTORS CORPORATION

**On Appeal from the United States District Court
For the District of Columbia**

**BRIEF FOR THE INTERSTATE COMMERCE
COMMISSION**

OPINIONS BELOW

The opinion of the District Court (R. 70) is reported at 170 F. Supp. 38. The reports of the Inter-

state Commerce Commission (R. 54-63, 8-39) are reported at 71 M.C.C. 561 and 77 M.C.C. 605.

JURISDICTION

The judgment of the District Court was entered January 30, 1959 (R. 87). Notice of appeal was filed March 27, 1959 (R. 88). Probable jurisdiction was noted on October 12, 1959 (R. 92). The jurisdiction of this Court rests on 28 U.S.C. 1253 and 2101(b).

STATUTES INVOLVED

The National Transportation Policy (54 Stat. 899, 49 U.S.C., preceding Section 1), and the pertinent provisions of the Interstate Commerce Act (24 Stat. 379, as amended, 49 U.S.C. 1 et seq.) are set forth in Appendix A to the brief of the appellants (App. Br. pp. 1a-7a).

QUESTIONS PRESENTED

1. Whether the proviso in Section 5(2) (b) of the Interstate Commerce Act precludes the Commission from authorizing, pursuant to Section 209, a subsidiary of a railroad to transport as a motor contract carrier new automobiles and trucks for a single shipper, such service being restricted to points which are stations on the parent railroad.

2. Whether the District Court usurped the Commission's function by making independent findings of fact.

3. Whether the Commission's grant of contract carrier authority was based upon an erroneous interpretation of Section 209(b).

4. Whether the grant of contract carrier authority here involved violates Section 210 of the Act.

STATEMENT

This is an appeal by American Trucking Associations, Inc., its Contract Carrier Conference, the National Automobile Transporters Association, and six motor carriers, four of them being common carriers by motor vehicle and two of them being contract carriers by motor vehicle,¹ from the decision of a three-judge District Court sustaining the order of the Commission of September 9, 1958 (R. 8-43),² in four consolidated dockets of the Commission, namely, *Pacific Motor Trucking Co. Extension—Oregon*, MC-78787 (Sub-No. 34); *Pacific Motor Trucking Co. Extension—New Motor Vehicles to Additional Nevada Points*, MC-78787 (Sub-No. 35); *Pacific Motor Trucking Co. Extension—New Motor Vehicles, Raymer, Cal. to Arizona*, MC-78787 (Sub-No. 36); and *Pacific Motor Trucking Co. Extension—Automobiles—California Assembly Plants to Seven Western States*, MC-78787 (Sub-No. 37). The Commission

¹ The two motor carrier appellants which are contract carriers by motor vehicle are Hadley Auto Transport (Prot. Ex. 107, R. 443, 451, 594-98) and B. & H. Truckaway (Prot. Ex. 121, R. 466, 637-38).

² R. 42-43 is a notice to the parties issued on September 22, 1958, correcting the findings of the Commission on Sheet 31 of its report (R. 33) by adding after the word "require" in line 11 of R. 33, the following: "will be consistent with the public interest and the national transportation policy." This report of September 9, 1958, as corrected, has been printed at 77 M.C.C. 605.

decision directed issuance, upon certain conditions, of motor contract carrier permits under section 209 (b) of the Interstate Commerce Act (49 U.S.C. 309(b)), authorizing Pacific Motor Trucking Company (hereinafter called PMT) of San Francisco, California, to transport, generally speaking, automobiles and trucks, except trailers, in initial movements, in truckaway and/or driveaway service, from three assembly plants of the General Motors Corporation (hereinafter called GM) located in California, to three named off-rail points in Nevada and to all points in Oregon, Nevada, Utah, Arizona and New Mexico which are stations on the rail lines of the Southern Pacific Company (hereinafter called SP). Appellee PMT, the applicant, and appellee GM, the applicant's supporting shipper, intervened in the court below (R. 43-45 and 74) in support of the Commission's order. PMT is a wholly-owned subsidiary (R. 18) of SP, which operates an extensive railroad system in the seven states of Oregon, California, Nevada, Utah, Arizona, New Mexico and Texas (Appl. Ex. 3, R. 169-70, 187, 473; Prot. Ex. 70, R. 395, 396, 552-53; and Prot. Ex. 84, R. 400-01, 403, 562-63).

Assembly plants of GM: GM produces various makes of automobiles and trucks, including "Chevrolet" automobiles and trucks, and "Buick", "Oldsmobile" and "Pontiac" automobiles. The component parts of such commodities are coordinated and assembled at various GM plants throughout the country, and the completed products are distributed from those plants to dealers in various geographical

regions. Such distribution is effected from each plant throughout the country either by rail or contract motor carrier (R. 209-11, 270), *except* that the California assembly plants do not have region-wide motor contract carrier service available (R. 215-16, 270).

Transportation from two California assembly plants of the Chevrolet Division of GM is involved in the Commission's grants in this case, one plant being located at Oakland³ and the other at Raymer.⁴ Also involved in this case is the assembly plant for the Buick, Oldsmobile and Pontiac Division⁵ of GM, located at South Gate, California, in the Los Angeles metropolitan area, but not contiguous to that city.

As established by GM, the normal distribution territory of the Chevrolet Oakland No. 1 plant covers all of Washington and Oregon, the western part of Idaho and the northern portions of California and Nevada (Int. Ex. 18, R. 209, 500-01). The territory for

³ Various described in the record as the "Oakland No. 1" or "Melrose" plant (R. 171, 208, 211). It assembles *passenger* automobiles only (R. 96). A second Chevrolet assembly plant at Oakland, known as the "Oakland No. 2" or "East 14th St." plant (R. 96) is located some 3 miles distant from the Melrose plant. It assembles commercial vehicles only (R. 102). However, the Chevrolet *trucks* assembled at the Oakland No. 2 plant which are to be transported by PMT's motor service are taken by GM to the Oakland No. 1 plant for delivery to PMT (R. 174-75, and 57). This situation accounts for the Commission's statement in its report (R. 21) that "[Oakland] Plant No. 1, so far as applicant is concerned, is the shipping point for both plants [Nos. 1 and 2]."

⁴ Various described in the record as the "Raymer", "Van Nuys", or "Los Angeles" plant, located within the City of Los Angeles (R. 179, 208, 211).

⁵ Commonly known as "BOP" (R. 269).

the Chevrolet Raymer plant covers the eastern part of Idaho, the western part of Utah, the southern parts of California and Nevada, the southwestern corner of New Mexico, and all of Arizona except for the northeastern corner (Id.). The normal distribution area for the BOP plant at South Gate includes all of Washington, Oregon, California, and Nevada, and the western portions of Idaho, Utah and Arizona (Int. Ex. 23, R. 269-70, 502-03).

GM established those assembly plants on the West Coast, and it is perennially and notoriously in the midst of extreme sales competition with other makers of automobiles and trucks (R. 205-06, 226-27, 254-55). Since 1935, PMT has been a contract carrier from the Oakland Chevrolet plant (R. 171-72), and from the Raymer Chevrolet and South Gate BOP plants since their inception in 1947 and 1937, respectively (R. 179, 182). This has been pursuant to GM's long-standing policy of employing only contract motor carriers (R. 213-17, 251-53, 275, 288-89). PMT has given GM satisfactory, dedicated service (R. 173, 176, 182, 186, 213, 275) within the limits of that carrier's permits, which service, up to the time the permits were issued in this case, has been limited to transportation in intrastate and interstate or foreign commerce physically performed within California, except for two permits previously issued by the Commission (later to be described), authorizing transportation from Oakland to three small Nevada points which are not located on any rail line, and to all Nevada points which are stations on the SP (R. 18).

Practically all other transportation from the three California plants to the distribution territories mentioned has in the past been performed in rail movements, via SP, or via SP and its rail connections (R. 198, 211, 221-22, 278-79).

GM's needs for extension of PMT's services. GM's dealers in those outlying areas have been demanding more expeditious service than rails can furnish (R. 216, 273), and some dealers cannot afford deliveries in rail carrier quantities (R. 113). The record shows material differences in transit times from origin plants to destinations, between all-rail movements and all-motor (PMT) movements (Appl. Ex. 8, R. 170, 187, 480-87, and Appl. Ex. 32, R. 357-58, 517), which time factor has an adverse effect upon the competitive situation of GM's dealers, as opposed to dealers for other makes of automobiles.

In addition to the physical factor resulting from the proximity of PMT's terminals to the discharge gates at GM's plants (to be discussed later), which no other motor carrier can match, GM had the assurance from past experience with PMT that it will continue to dedicate its services and equipment as a contract carrier solely to the performance of GM's distribution. No motor common carrier, such as appellants Convoy, Robertson, Western, and Kenosha, can lawfully furnish such exclusive service by reason of the very fact that each is a common carrier with a duty to render service to all shippers alike, and not to confine its service to one shipper (R. 217). And as for the two contract carrier appellants, Hadley and B & H, which have appropriate territorial auth-

ority to perform *some* service for GM (Prot. Ex. 107, R. 594-95, and Prot. Ex. 121, R. 637-38), GM has declined to utilize their services, for they are under contract to perform services for, or have previously dedicated their services to, GM's competitors in the area (R. 161-63, 443-48, 466). The reason assigned for such declination was the possibility that the quality or quantity of their performance for GM may suffer in the event the demands of competing automobile manufacturers for their services and equipment were more than those contract carriers could meet on particular occasions (R. 251-52).

Physical characteristics at the three California plants. Immediately adjacent to each of the GM assembly plants at Oakland No. 1, Raymer, and South Gate, California, PMT has for a number of years maintained terminals to facilitate the flow of new automobiles coming off the assembly lines in the plants. No space has been available at either of those plants for motor carriers other than PMT to provide terminal receiving facilities in the same manner as has been provided by PMT. These and other unique physical characteristics of the three plants were testified to and are graphically shown in the record as to each of these plants, viz., *Oakland No. 1*, Appl. Exs. 4, 5 and 6, R. 169, 174-75, 186-187, 189-94, 474-79; *Raymer*, Appl. Exs. 9, 10 and 11, R. 179-82, 187-91, 488-93; *South Gate*, Appl. Exs. 12, 13 and 14, R. 182-85, 187, 191-93, 494-99. With respect to the Raymer plant, the Commission said in its report (R. 19-20):

Its [GM's] plant at Raymer is adjacent to yard facilities owned by Southern Pacific and leased to applicant. Inasmuch as extensive storage facilities are not maintained at the Raymer plant, transportation service must be closely coordinated with plant operations to avoid congestion or delay in deliveries to dealers. For these reasons, shipper desires the exclusive service of one contract carrier so that there will be close cooperation and no division of responsibility. Use of any other carrier would require outgoing shipments to be dispatched through shipper's incoming gate, causing confusion and disarranging the operations at the plant which are geared to the use of applicant's service from its nearby yard.

In the same report (R. 22), the Commission found that the physical facilities at the Oakland No. 1 and South Gate plants were similar to those at the Raymer plant.

Previous authorizations to PMT. Prior to the filing of the applications in the four dockets in question here, PMT had been issued motor common carrier certificates by the Commission in Dockets Nos. MC-78786 and various sub numbers in that series^a to transport general commodities, with certain exceptions, between points in Oregon, California, Nevada, Arizona, New Mexico and Texas, generally over regular routes paralleling the rail lines of the parent SP, and generally restricted to service which is auxiliary to or supplemental of the rail service of the proprietary railroad (R. 18). PMT, since December 10,

^a R. 347-48; Appl. Ex. 30 in the Sub-37 docket (79 sheets).

1935, has held *contract* carrier operating authority from the Railroad Commission of the State of California for *intrastate* transportation of automobiles and trucks within that state (R. 105, 172, 202 and Appl. Ex. 2 in Sub-37 Record, sheets 54 and 55). The Commission also had issued to PMT four *contract* carrier permits in sub numbers in docket series No. MC-78787, containing no "auxiliary or supplemental" service restrictions, but with approvals given in each case to dual operations by PMT as a common carrier and as a contract carrier, for the transportation of new automobiles, new trucks, and new buses in initial movements,⁷ in truckaway and driveaway service, namely, (1) from Oakland, Calif., to the non-rail point of Hawthorne, Nevada, and all Nevada rail points located on the SP (MC-78787, Sub-23, issued June 20, 1944) (R. 172); (2) for foreign commerce between Los Angeles, Calif., on the one hand, and, on the other, Calexico and San Ysidro, Calif., both lo-

⁷ An "initial movement" is "the transportation of new automotive equipment from a point of manufacture or assembly to destination, or to a point of interchange with another common carrier. Transportation of new, used, damaged or repossessed cars from other than the point of manufacture or assembly is called a "secondary movement". *Clark Ext. of Operations*, 16 M.C.C. 535, 537 (1939); *Howard Sober, Inc., Ext.—Allentown, Pa.*, 23 M.C.C. 80, 81 (1940).

⁸ If the motor vehicles being transported are being moved with motive power furnished by one or more of such vehicles, the service is "driveaway". If not, it is "truckaway". *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 481 (1945); *Danbury Extension of Operations—Charlotte, N. C.*, 46 M.C.C. 147, 149 (1946).

cated on the Mexican border (MC-78787, Sub 27, issued April 21, 1950) (R. 18); (3) from Raymer, Calif., to points in the Los Angeles Harbor Commercial Zone," for further transshipment by water (MC-78787, Sub 30, issued June 22, 1950) (R. 18); and (4) from Oakland, Calif., to Carson City and Minden, Nevada, both being non-rail points (MC-78787, Sub 31, issued June 21, 1955) (R. 172). PMT's only shipper under these four I.C.C. permits and its California intrastate permit has been GM (R. 186). Thus, prior to the filing of the four contract carrier applications involved in this case, the Commission had issued so-called "unrestricted" contract carrier operating authorities to PMT for service from GM plants in California for some physically interstate operations across the state line into Nevada, and for foreign commerce between points physically within California, with approval of its dual operations.

The present proceedings. On October 14, 1955, March 5, 1956, March 9, 1956, and October 23, 1956 (R. 10-11), PMT filed in its Dockets Nos. MC-78787, Subs Nos. 34, 35, 36 and 37, respectively, applications for contract carrier permits under Section 209 (b) to extend its contract carrier service in the transportation of new automotive equipment to new interstate destinations from the two GM Chevrolet plants at Oakland and from the Chevrolet plant at Raymer and to begin a new interstate service from the BOP

* A special zone established by the Commission under Section 203(b) (8) of the Interstate Commerce Act, 49 U.S.C. 303(b) (8), in 3 M.C.C. 248, and 51 M.C.C. 676.

plant of GM at South Gate. The motor carrier service for which authority was *requested* in these four applications is set forth in detail in the Commission's report of September 9, 1958 (Id.). Generally speaking, it may be said that by the *Sub 34* application PMT sought to extend its contract carrier service from the two GM Chevrolet plants at Oakland, Calif., to all Oregon points which are stations on the SP; by the *Sub 35* application, PMT sought the right to serve three additional non-rail points in Nevada from Oakland, Calif.; by the *Sub 36* application, PMT sought to serve all Arizona points which are stations on the SP from the Raymer Chevrolet plant; and by the *Sub 37* application, PMT sought authority to round out its service areas from the two Oakland and the Raymer Chevrolet plants to include *all* points in the seven states of Washington, Oregon, Idaho, Nevada, Utah, Arizona and New Mexico, whether or not they were stations on the SP, and also from the BOP plant at South Gate to *all* points in the same seven-state area, except that Montana was substituted for New Mexico.

Following appropriate administrative proceedings, which included oral argument before the entire Commission with respect to the dual operations question involved in the *Sub 34* application, the Commission issued its report of May 8, 1957, published in 71 M.C.C. 561 (R. 54-63), authorizing the issuance of a permit in the *Sub 34* docket. Subsequently, the four applications were consolidated for oral argument before the entire Commission on December 4, 1957. The

report of the Commission following such oral argument was issued on September 9, 1958, published in 77 M.C.C. 605 (R. 8-43), partially granting each application, subject to certain conditions (R. 33 and 39).

In general, the net effect of the Commission's action here, from a territorial standpoint, may be described as follows: PMT had previously been issued permits to serve SP points in Nevada, and three non-rail points in that state. By the grants made here, PMT was authorized to serve three additional non-rail Nevada destinations, and to serve SP points in the four additional states of Oregon, Utah, Arizona, and New Mexico. PMT's applications were denied as to any service in Washington, Idaho, and Montana, and as to non-SP points in Oregon, Nevada (with the exception of the three additional non-rail points mentioned), Utah, Arizona, and New Mexico.

The instant civil action was filed by the protestant motor carriers and their trade associations before a three-judge District Court for the District of Columbia on October 7, 1958, (R. 1). Following a denial by the District Court on October 8, 1958, of a temporary restraining order (R. 73), permits in PMT's Sub 34, 35, 36 and 37 dockets were issued by the Commission on November 24, 1958 (Id.). The three-judge District Court rendered its opinion (170 F. Supp. 38) sustaining the Commission's grants on January 20, 1959 (R. 70-86), the majority of that court also holding (R. 85-86) that none of the nine plaintiffs had shown standing to sue. Judgment was entered in the

District Court on January 30, 1959 (R. 87-88), and notice of this appeal was filed on March 27, 1959 (R. 88-91)

SUMMARY OF ARGUMENT

I

The Interstate Commerce Commission, pursuant to Section 209(b)⁹ of the Interstate Commerce Act, authorized Pacific Motor Trucking Company, a wholly-owned subsidiary of the Southern Pacific Company, to transport as a motor contract carrier new automobiles and trucks from three General Motors plants in California to points in Oregon, Nevada, Utah, Arizona and New Mexico which are stations on the Southern Pacific railroad (plus three off-rail points in Nevada). The appellants contend that the grant of such contract carrier authority to a rail affiliate is precluded by the proviso of Section 5(2)(b) that before a railroad or its affiliate may be authorized to purchase, or otherwise acquire control of an existing motor carrier, the Commission must find that "the proposed transaction * * * will enable such [railroad] to use service by motor vehicle to public advantage in its operations, and will not unduly restrain competition."

GM, like other motor manufacturers, has a unique need for transportation service, synchronized with its assembly lines, for the delivery of new automobiles and trucks to its dealers. Its three California assembly plants have long made extensive use of PMT's intrastate contract carrier service to deliver its products to California points. PMT's contract

carrier service has been exclusively for GM, and it has established its receiving yards adjacent to the latter's three California plants. GM used the Southern Pacific railroad for the movement of practically all of the remainder of the output of its California plants to dealers located in other states in the distribution area of those plants, which variously comprise Oregon, Washington, Montana, Idaho, Nevada, Utah, Arizona and New Mexico (in addition to California). For competitive and other reasons, motor transportation of its products to this entire distribution area would be advantageous to GM. Accordingly, at GM's request, PMT applied for motor contract carrier permits authorizing it to transport new automobiles and trucks from GM's California plants to all points in those states (except California).

The Commission authorized PMT to serve GM's California plants as a contract carrier, but only to those points in Oregon, Nevada, Utah, Arizona and New Mexico which are stations on the Southern Pacific railroad. In thus restricting the authorized service without regard to GM's need for a broader service, the Commission took into account the general policy of Section 5(2)(b) against railroad domination or monopoly of motor transport. The Commission concluded that except in unusual circumstances which it did not find present here, Congress did not intend to permit a railroad or its subsidiary to provide motor contract carrier service "broader in scope than its rail operation."

The Commission's action is consistent with the principles laid down in *American Trucking Ass'ns.*

v. *United States*, 355 U.S. 141. There this Court held "that the Congress did not intend the rigid requirement of Section 5(2)(b) to be considered as a limitation on certificates issued under Section 207", but "that the underlying policy of Section 5(2)(b) must not be divorced from proceedings for new certificates under Section 207." In the present case, the Commission concluded that the same principles apply where a rail affiliate applies for a contract carrier permit pursuant to Section 209(b).

In applying the policy of Section 5(2)(b) in this case "as a guiding light, not as a rigid limitation," the Commission took into account not only the peculiar transportation needs of the shipper, but also the circumstance that authorizing PMT to serve GM as a motor contract carrier only to points served by its rail parent would only affect traffic which is now handled by the railroad, while authority to serve non-SP points would have a competitive impact upon other carriers, both rail and motor. Under these circumstances, we contend that the policy underlying Section 5(2)(b) was not frustrated by the Commission's grant of authority to transport as a contract carrier a single commodity for a single shipper to points already served by its rail parent.

II

Contrary to the appellant's suggestion, the court below did not usurp the Commission's function by making its own independent finding of circumstances which would support a grant of authority to PMT to engage in motor carrier operations without regard

to the restrictive policy underlying Section 5(2)(b). Read in context, that court's reference to "special circumstances" can only mean that it found justification in the evidence for authorizing PMT to perform for GM a specialized contract carrier service restricted to points which are stations on the rail lines of its parent.

III

The court below correctly held that in determining PMT's applications in 1958, the Commission was bound to take into account the criteria, added to Section 209(b) in 1957, prescribed by Congress to govern the grant or denial of contract carrier permits. *Ziffrin v. United States*, 318 U.S. 73, 78. Contrary to the appellants' apparent suggestion, neither the Commission nor the court below took the position that the addition of such specific criteria was intended to make the policy underlying Section 5(2)(b) inapplicable to the grant or denial of a motor contract carrier permit to a railroad or its affiliate. Indeed, the Commission expressed the contrary view and the court below approved.

IV

The Commission's grant of motor contract carrier authority to PMT did not offend Section 210 which prohibits any person or affiliated persons from engaging in motor common and motor contract carriage "over the same route or within the same territory" unless the Commission finds that such dual operations will be consistent with the public interest and the national transportation policy.

The Commission considered carefully the possibilities of discrimination which exist when affiliated carriers provide both common and contract carrier service for the same shippers. In granting motor contract carrier authority to PMT, it required PMT to accept conditions prohibiting it from transporting automobiles and trucks under its common carrier certificates. Although the motor common carrier authority of another Southern Pacific subsidiary is limited to Texas and Louisiana, and therefore does not invoke Section 210 because the resulting dual operations are not "over the same route or within the same territory," the Commission nevertheless made as to it the findings required by Section 210. Notwithstanding that Section 210 applies only to the combination of motor common and motor contract carrier operations, the Commission also noted that the grant to PMT would mean that Southern Pacific-PMT could transport outbound GM vehicles in rail, common and motor contract carrier service and inbound parts in both rail and motor common carrier service. It concluded that it could approve such operations in view of such facts as that Southern Pacific-PMT had performed such dual rail and motor service for GM for years without complaint. Also, only competing automotive manufacturers could be prejudiced by such operations, and Ford, the only GM competitor with a plant served by Southern Pacific, has neither complained nor indicated inability to protect its interests. Such circumstances, coupled with the Commission's reservation of power to impose future conditions, provided a rational basis for its treatment of

the dual operations issues. In any event, the appellant motor carriers and associations are without standing to challenge the Commission's application of the provisions of Section 210 for the protection of shippers.

ARGUMENT

I

The Proviso of Section 5(2)(b) of the Interstate Commerce Act, Relating To Rail Acquisitions of Motor Carriers, Did Not Preclude the Commission In the Circumstances of This Case from Authorizing PMT To Transport As a Motor Contract Carrier New Automobiles and Trucks for a Single Shipper To Points Which (With Minor Exceptions) Are Stations On the Railroad Lines of Its Parent, the Southern Pacific Company

In this case, the Commission has authorized PMT, a wholly owned subsidiary of the Southern Pacific Company, to transport as a motor contract carrier new automobiles and trucks from the Oakland and Los Angeles plants of General Motors Corporation to points which (with few exceptions) are stations on the parent railroad. The Commission acted pursuant to Section 209(b) of the Interstate Commerce Act which provides generally that "Subject to Section 210" a contract carrier permit may be issued if the Commission finds "that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared by this Act." Section 209(b) was amended in 1957 to specify various factors which the Commission must consider "in determining

whether issuance of a permit will be consistent with the public interest and the national transportation policy."

The appellants contend that as a matter of law the Commission is precluded from authorizing PMT to perform motor contract carrier service between GM's California plants and points in other states which are stations on the parent railroad, unless such service is limited to "auxiliary and supplementary" service, or except in "special circumstances" which the Commission did not find to be present. The sole statutory basis for this contention is the proviso of Section 5(2)(b) that before the Commission may authorize a rail affiliate to *acquire* an existing motor carrier operation, it must find that the transaction will enable the railroad to use "service by motor vehicle to public advantage in its operations and will not unduly restrain competition." We submit that the contention is without merit.

The Commission found, and it is not disputed, that GM needs motor transportation for the delivery of new automobiles and trucks from its three plants here involved in order to compete with other automotive manufacturers (R. 19, 20, 22, 26).

The nature of GM's need for motor transportation for its new automobiles and trucks is peculiar to the automotive manufacturing industry. Automobiles are manufactured in many combinations of model, color, upholstery and special equipment, e.g. power brakes, in large part upon specific customers' orders (R. 208-209). Most shipments to dealers involve such combinations. Manufacturers can avoid either plant con-

gestion or huge storage problems only by carefully synchronizing the flow of cars off the assembly lines with the outbound transportation of cars to dealers. See, e.g., *Western Auto Shippers Extension of Operations*, 3 M.C.C. 173, 175 (1937); *Barton-Robison Convoy Co., Inc. Extension*, 19 M.C.C. 629, 632-633 (1939). The automotive manufacturers generally find that such essential coordination of production with outbound transportation can be achieved only by utilizing one or a few motor carriers who are able and willing to gear their operations to the manufacturer's needs. While some automotive manufacturers prefer to utilize motor common carriers, others prefer to use motor contract carriers. However, as the appellants suggest (App. Br. 31, fn. 18), "there is little distinction between motor common and contract carriage of automobiles," by reason of the specialized nature of the service and the extremely limited class of shippers (particularly in initial movements of new vehicles). See *Bush Construction Co., Inc. v. Platten*, 48 M.C.C. 155, 162 (1948).

The Commission has long recognized these transportation problems of GM and other automotive manufacturers. Thus, in *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 490-491 (1945):

Ford and General Motors ship in great volume by both rail and motor carrier. Ford uses principally common carriers and only a few contract carriers, most of which serve no other producers to any important extent, if at all. General Motors uses both common and contract carriers to a great extent, although its Chevrolet division

employs contract carriers exclusively. Formerly, it permitted its dealers to retain control of transportation of automobiles. The dealers engaged numerous motor carriers, some irresponsible and inefficiently operated. As a result, the shipping facilities at Chevrolet's plants became congested by the carriers' vehicles, causing confusion and unnecessary expense, and the transportation was often unsatisfactory. To eliminate these conditions, General Motors, in 1934, adopted the policy of selling all its automobiles on a delivered basis and controlling the transportation. Chevrolet selected and helped develop seven well-organized and efficiently operated contract carriers and has since used them exclusively for its truck-away transportation from all assembling plants. They transport only for General Motors and are employed by it for all truck-away transportation of Buicks, Oldsmobiles, and Pontiacs from Linden [N. J.]. Each of these carriers serves a different plant and has its own territory which does not generally overlap that of the others. * * *

The contract carriers cooperate closely with General Motors, almost as if they were departments of its distributing organization. * * *

Similarly, in *Texas Auto Transports, Inc., Contract Carrier Application*, 62 M.C.C. 473, 476-477 (1954):

General Motors prefers the service of a separate contract motor carrier at its plants which produce Buick, Oldsmobile, and Pontiac automobiles, including the one at Arlington, and Woods has therefore set up the separate company, Texas Transports, in order to keep the business at Arlington separate from the operations of United

and Transports. General Motors desires to retain control over the transportation of its vehicles moving from Arlington, and it will pay all transportation charges. It asserts that the service of a contract carrier which can devote its time and equipment exclusively to its transportation needs is a necessity for the efficient operation of the new plant; that it thereby is able to effect excellent coordination in fitting transportation equipment to production and move its automobiles as soon as produced; and that prompt movements are necessary because of limited storage space at the new plant. It considers a contract carrier to be an integral part of its assembly and distribution operation because the use of such a service permits it to effect deliveries to dealers who sell in a highly competitive market where delays cause loss of sales. It does not wish to use the services of common carriers by motor vehicle. * * *

Under the contract between General Motors and Texas Transports the latter's equipment would be devoted exclusively to the BOP division at Arlington, and its motor-carrier operations would be fitted into the distribution program at this plant. The trailers used by the carrier would be designed for the transportation of Buick, Oldsmobile, and Pontiac automobiles, and it would receive advance information with respect to changes required to be made in the trailers for efficient handling of new models. A forecast of monthly production at the plant would be submitted to Texas Transports to enable it to provide the necessary equipment for the prompt movement of automobiles as they come

from the assembly line. Daily communication would be maintained between the plant and Texas Transports, and it is expected that switchboard connections at the plant would include service to terminal facilities of the motor carrier. * * *

For similar recognition by the Commission of the peculiar needs of other automotive manufacturers and their dealers, see *Melton Contract Carrier Application*, 51 M.C.C. 117 (1949) (Kaiser-Frazer); *Hadley Extension of Operations*, 46 M.C.C. 946 (1946) (Ford).

In the instant proceedings before the Commission, GM officials testified as to these factors at the plants here involved (R. 113-115; 129-132; 212-215; 272-276; 325, 333).

In the instant case, the Commission found that PMT "presently is providing General Motors with motor transportation in the movement of a substantial volume of traffic to intrastate points in California", as well as with limited interstate motor contract carrier service (R. 22). As the appellants point out (App. br. p. 4, fn. 4), "Of total movements by PMT in 1955 of 175,951 vehicles, only 6,100, or less than 3.5% moved interstate."¹⁰ The great bulk of the output of GM's California plants is shipped to

¹⁰ The record references, R. 468-469, given by the appellants, show 1955 figures for Oakland and 1956 figures for Raymer. In 1956 the South Gate plant produced 132,551 automobiles, of which 102,901 units, or 88%, were delivered within California (R. 322). PMT transported 65% of that intrastate traffic (ibid).

dealers in California. Since California has approximately three times the combined population of Arizona, Nevada, New Mexico, Oregon and Utah (the destination states involved in the grant of authority to PMT), to say nothing of only the points in those states which are stations on the Southern Pacific railroad, we may assume that most of the output of the GM plants here involved will continue to be shipped to points in California. In other words, PMT's interstate contract service for GM is the tail of a much larger dog.

The Commission found that in the course of rendering this pre-existing service since 1935, PMT established receiving yards immediately adjacent to the storage yards of GM's plants at Raymer, Oakland and South Gate, "and its motor operations [are] fully integrated with shipper's manufacturing operations at those points" (R. 22). The physical relationship of PMT's facilities to the GM plants is illustrated by the maps and photographs comprising Exhibits 4-6, R. 474-479 (Oakland), Exhibits 9-11, R. 488-493 (Raymer), and Exhibits 12-14, R. 494-499 (South Gate).

PMT's prior transportation of new automobiles and trucks for GM has been as a contract carrier (R. 20). In the instant application proceeding, the Commission noted that the "Applicant proposes to render a service only for General Motors, the only shipper it presently serves, and to assign its equipment to the exclusive use of that shipper" (R. 19). The Commission concluded that "Clearly its proposed

service will be that of a contract carrier" (R. 19).¹¹

We do not understand the appellants to deny (1) that GM needs motor transportation, (2) that motor contract carrier service is appropriate to meet that shipper's needs, or that (3) PMT's prior and proposed service to GM is that of a contract carrier. Rather, their sole contention is that PMT, as an affiliate of Southern Pacific, should not be allowed to perform motor contract carrier service for GM.

Here, PMT, at the request of GM, applied for authority to transport new automobiles and trucks from GM's three California plants to all points in Arizona, Idaho, Montana (only from South Gate), Nevada, New Mexico (not from South Gate), Oregon, Utah and Washington. Although, the Commission did not so find specifically, it is obvious that GM's need for PMT's specialized and exclusive service, integrated with its assembly lines, was as great for destinations which are not rail stations on the Southern Pacific as

¹¹ Section 203(a)(15), as amended on August 22, 1957, defines "contract carrier" as

* * * any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

for those which are. If PMT were an independent motor carrier (i.e., non-rail-affiliated), both the present record and the Commission's precedents would have supported a grant to PMT of all the contract carrier authority for which it had applied.

However, after referring to the policy underlying Section 5(2)(b) and the National Transportation Policy, the Commission concluded that "we do not believe that Congress intended, except in unusual circumstances, to allow any railroad, through the medium of a motor subsidiary, to provide all-truck service as a contract carrier in competition with other rail lines and independently operated motor carriers without safeguards to insure that such service shall not be broader in scope than its rail operation" (R. 31). Thereupon, the Commission determined that (R. 31):

In the absence of any showing of unusual conditions in these proceedings, any permits issued to applicant will contain a territorial limitation of the service authorized to points which are stations on the Southern Pacific railroad. Also a restriction is warranted reserving to the Commission the right to impose in the future any restrictions or conditions which may then appear to be necessary or desirable in the public interest.

Accordingly, the Commission authorized PMT to transport as a contract carrier new automobiles and trucks from GM's three plants to points in Oregon, Nevada, Utah, Arizona and New Mexico which are stations on the Southern Pacific railroad (plus the

off-rail points of Austin, Tonopah and Yerington in Nevada) (R. 33, 39). The Commission denied PMT's application to serve points in Washington, Montana and Idaho.

Section 5(2)(b), authorizing the Commission to approve carrier mergers or the acquisition of control of one carrier by another carrier, provides that the Commission shall not authorize a railroad or its affiliate *to acquire control, etc.*, of a motor carrier unless it finds that "the transaction proposed will be consistent with the public interest and will enable such [railroad] to use service by motor vehicle to public advantage in its operation and will not unduly restrain competition." On its face, Section 5(2)(b) has no application to the authorization of *new or additional* contract carrier authority, just as nothing in Section 209(b) suggests that there is to be read into it the restrictions of Section 5(2)(b) upon the acquisition by a railroad or its affiliate of *existing* motor carrier operating rights and properties.

However, in a series of cases, this Court has sustained the Commission's view as to the meaning of the proviso of Section 5(2)(b) and its relationship to Section 207, which governs the issuance of motor *common* carrier certificates of public convenience and necessity. In the lead case, *United States v. Rock Island Motor Transit Co.*, 340 U.S. 419, this Court upheld the Commission's power under Section 5(2)(b) to subject a rail affiliate's acquisition of an existing motor carrier to conditions restricting the motor carrier operations to service auxiliary to or supple-

mental of the railroad's operations.¹² During the same Term, this Court upheld the Commission's power to impose such conditions in authorizing, pursuant to Section 207, a rail affiliate to engage in *new or additional* motor common carrier operations. *United States v. Texas & Pacific Motor Transport Co.*, 340 U.S. 450.

In 1957, *American Trucking Assn's. v. United States*, 355 U.S. 141, involved the question of whether the proviso of Section 5(2)(b) *must* be read into Section 207 as a rigid prohibition against the Commission authorizing a rail affiliate to engage in new or additional motor common carrier service without such auxiliary and supplemental service restrictions. In that case, the Commission had held that while it was obliged to take into account the policy of the proviso in administering Section 207, the proviso could not be imported into Section 207 as rigidly precluding the Commission in any and all circumstances from authorizing a rail affiliate to engage in "unrestricted" motor common carrier operations.

¹² The conditions customarily imposed upon motor common carrier operations by a railroad or its affiliate may be summarized as follows:

- (1) motor service to be performed only at rail rates and on rail bills of lading; (2) service to be performed only to points which are stations on the railroad; (3) the local character of the motor service to be insured by the designation of key points between or through which shipments may not be transported by motor; (4) contracts between railroad and motor carrier affiliate to be subject to revision by the Commission; and (5) a reservation to the Commission of power to impose further conditions.

In sustaining the Commission's action under Section 207 in the *American Trucking Assn's.* case, this Court reached conclusions which are equally applicable to the authorization of motor contract carrier operations by a rail affiliate under Section 209(b), as follows (355 U.S. at pp. 149-150, 151-152, 154):

Section 207, which defines the showing on which issuance of a certificate of public convenience and necessity is predicated, makes no reference to the phrase "service . . . in its operations" used in § 5(2)(b), nor is there any language even suggesting a mandatory limitation to service which is auxiliary or supplementary.

The legislative history of the Motor Carrier Act of 1935 gives no indication that § 213(a)(1), the predecessor of § 5(2)(b), was to be considered a limitation on applications under § 207.

* * *

In interpreting § 207, the Commission has accepted the policy of § 5(2)(b) as a guiding light, not as a rigid limitation. While it has applied auxiliary and supplementary restrictions in many § 207 proceedings, the Commission has occasionally issued certificates to railroad subsidiaries without the restrictions where "special circumstances" prevail, namely, where unrestricted operations by the rail-owned carrier are found on specific facts and circumstances to be in the public interest. * * *

We conclude, therefore, that the Congress did not intend the rigid requirement of § 5(2)(b) to be considered as a limitation on certificates issued under § 207.

* * *

We repeat, as was said in those cases, that the underlying policy of § 5(2)(b) must not be divorced from proceedings for new certificates under § 207. Indeed, the Commission must take "cognizance" of the National Transportation Policy and apply the Act "as a whole." But, for reasons we have stated, we do not believe that the Commission acts beyond its statutory authority when in the public interest it occasionally departs from the auxiliary and supplementary limitations in a § 207 proceeding.

* * * The Commission has retained jurisdiction "to impose in the future whatever restrictions or conditions, if any, appear necessary in the public interest by reason of material changes in conditions or circumstances surrounding applicant's operations in relation to those of competing motor carriers." 63 M.C.C. at 108. This reservation gives it continuing jurisdiction to make certain that the unlimited certificate issued here does not operate to defeat the National Transportation Policy.

Prior to the instant case, the courts had not considered the relationship of the proviso of Section 5(2)(b) to the grant of contract carrier permits pursuant to Section 209(b). However, in its report in this case, after quoting and discussing this Court's decision in the *American Trucking Assn's.* case, the Commission stated that "we think that undoubtedly the same principle applies here where contract carrier permits are sought and in reaching the conclusions above indicated, namely, that some authority should

be granted in each proceeding, we have in fact given due consideration to the National Transportation Policy and to the principles which underlie Section 5(2)(b)" (R. 29).

We agree with the appellants that the proviso of Section 5(2)(b) reflects a Congressional policy against railroad monopolization or domination of motor transportation. However, the requirement of the proviso as to *acquisitions* reaches the grant of new contract carrier authority under Section 209 "as a guiding light, not as a rigid limitation" (*American Trucking Assn's. v. United States*, 355 U.S. at 149). At the same time, "the underlying policy of Section 5(2)(b) must not be divorced from proceedings for new [permits] under Section [209]" (ibid. at 151).

As a "guiding light" or as an "underlying policy", the anti-monopoly objectives of the proviso of Section 5(2)(b) do not import in Section 209 (any more than they did into Section 207) the five "auxiliary and supplementary" conditions which, as this Court held in *United States v. Rock Island Motor Transit Co.*, *supra*, the Commission is empowered to impose. Indeed, in that case, this Court noted that "the words 'auxiliary to or supplemental of' are not taken from the Act. There is no such specific limitation for railroad operation of motor carriers" (at p. 437). And the Court added that "Different conditions are required under different circumstances to maintain the balance between rail and motor carriage" (at p. 443).¹³ Clearly, the imposition of varying conditions

¹³ Between 1948 and 1958, the railroads' share of inter-city traffic, measured in ton-miles, declined from 64.39% to

to different circumstances is "an exercise of the discretionary and supervisory power with which Congress has endowed the Commission" (at p. 442).

Thus, contrary to the appellants' contention, the Commission was under no compulsion in the present case to impose upon PMT's performance of specialized contract carrier transportation of a single commodity, for a single shipper, the same five auxiliary and supplemental service restrictions which it usually imposes upon the common carriage of general commodities by a rail-controlled motor carrier. The Commission could not ignore the anti-monopoly purpose of Section 5(2)(b), but it had broad discretion as to how to effectuate it.

In determining how to effectuate the policy of Section 5(2)(b) in the instant case, the Commission was bound to take into account the peculiar transportation needs of the shipper. Here, GM was already obtaining from PMT intrastate motor contract carrier service to California points for most of the output of its California plants. Obviously, it would be much more convenient for GM to obtain interstate motor service for the delivery of the balance of that output from PMT, which had already fully coordinated its operations to GM's production and delivery schedules. As this Court held in *American Trucking Assn's. v. United States*, *supra*, nothing in the policy of Section 5(2)(b) suggests that such shipper needs must be

6.31%, while the motor carriers' share increased from 7.72% to 20.47%, Annual Reports of the Interstate Commerce Commission. 1950, p. 22; 1959, p. 11.

wholly ignored in determining to what extent a rail affiliate may be authorized to engage in motor transportation. At the same time, the Commission held that General Motors' needs and its unwillingness to utilize the services of existing motor carriers to non-rail points would not justify a grant of authority to PMT to serve areas unrelated to the service area of its rail parent (R. 27).

In addition, the Commission considered the effect of a grant to PMT upon competing carriers. It noted that "Inasmuch as the considered traffic has been moving principally by rail, institution of the proposed service should have no adverse effect on existing motor carriers" (R. 20). Clearly, the competitive impact of PMT obtaining traffic previously handled by its rail parent is quite different from obtaining traffic which has been handled by independent motor carriers. The Commission also noted that to permit PMT to serve points which are not already served by its rail parent would have a heavy competitive impact in "territory served by other rail lines and by the existing motor carriers and would inevitably result in the diversion of a large percentage if not all of the traffic now moving in rail joint-line service."¹⁴ (R. 27). We submit, therefore, that there was a rational basis for the Commission's conclusion (R. 28) that "a grant of authority to applicant to serve only those points which are stations on the lines of

¹⁴ The extent of the rail joint-line movement of traffic originating in the three GM plants here involved is described in the Commission's report (R. 23-24).

the Southern Pacific should not result in any appreciable alteration of the existing competitive situation and should not unduly restrain competition or in any degree adversely affect the operations of other carriers."

Thus, the Commission determined that the policy of Section 5(2)(b) would be satisfied by restricting PMT's motor contract carrier service to points already served by its rail parent, and by reserving to itself "the right to impose in the future any restrictions or conditions which may then appear to be necessary or desirable in the public interest." The restriction of service to points which are served by the railroad is one of the conditions which this Court held in the *Rock Island Motor Transit Co.* case that the Commission was empowered to impose. It is obviously relevant and effective in effectuating the underlying policy of Section 5(2)(b). Moreover, the practical significance of the reservation of power to impose future restrictions upon the contract carrier operations which PMT was authorized to perform, was illustrated in *United States v. Rock Island Motor Transit Co.*, *supra*. Such a condition was specifically recognized by this Court in *American Trucking Assn's v. United States*, 355 U.S. at 152 and 154, as giving the Commission "continuing jurisdiction to make certain that the unlimited certificate issued here does not operate to defeat the National Transportation Policy."

II

The Court Below Did Not Err In Characterizing As "Special Circumstances," the Facts Relating To the Shipper's Need for Contract Carrier Service By PMT

The appellants attack the decision of the three-judge court as exceeding "the limits of judicial review of agency action" (App. br. pp. 36-41). This attack is based upon the statement in the lower court's opinion (R. 81) that:

Thus, although the Commission found an "absence of unusual conditions" which would justify the issuance of permits for service to points not on SP's rail line, there was, in the court's opinion, substantial evidence of special circumstances justifying the extensions of PMT's contract carrier authority to serve GM.

The precise contention is that the court below erred by itself making a finding of "special circumstances," to support a grant of unrestricted contract carrier authority to PMT, which the Commission had refused to make. The contention is without substance.

It is clear that the appellants' present contention arises out of their insistence that the grant of authority to PMT to serve only points which are rail stations on the Southern Pacific is an "unrestricted" authority which can be granted only in "unusual circumstances". Conversely, the Commission treated the grant as restricted in deference to the policy underlying the proviso of Section 5(2)(b).

Admittedly, the Commission found (R. 31) that there were not present such unusual or special cir-

cumstances as would justify a grant to PMT of contract carrier authority to serve all points in Washington, Oregon, Idaho, Montana, Nevada, Utah, Arizona and New Mexico—the seven-state (plus California) distribution area for the GM plants here involved. Looking only to the transportation needs of the shipper, it will hardly be denied that the shipper's need for motor contract carrier service to non-rail points was at least as great as its need for service to rail points. Indeed, applying only the criteria of Section 209(b), which normally are the exclusive standards governing the grant or denial of contract carrier permits, it probably would have been irrational or arbitrary to have authorized PMT to serve only the rail points, without regard to the same showing of shipper's need for service to both rail and non-rail points.

Here, the Commission plainly stated that the obvious convenience to General Motors of a grant of authority to PMT to serve the entire distribution area for its California plants, did not constitute such unusual circumstances as would justify authorizing PMT to render service beyond the service area of its rail parent. In so holding, the Commission subordinated the shipper's convenience to the underlying policy of the proviso of Section 5(2)(b) against rail monopolization of motor transportation.

The portion of the lower court's opinion quoted above states that "there was, in the court's opinion, substantial evidence of special circumstances justifying the extensions of PMT's contract carrier authority to serve GM." Read fairly and in context, we sub-

mit that the three-judge court was not usurping the Commission's function by making an independent finding of unusual circumstances justifying a grant of unrestricted contract carrier authority measured only by the usual standards of shipper need. Rather, we think it clear that the court's use of the phrase "special circumstances" was simply its conclusion that the evidence as to GM's special transportation needs and the competitive effects of a grant to PMT justified the Commission's action in authorizing PMT to provide motor contract carrier service only to points served by its parent railroad.

III

The Grant of Contract Carrier Authority To PMT Was Not Based By the Commission, Nor Sustained By the Three Judge Court, Upon An Erroneous Interpretation of Section 209(b)

Section 209(b) was amended, effective August 22, 1957, to provide, inter alia, that "In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements." We have difficulty in following the appellants' contention (App. br. p. 41) "that the District Court erred in holding that the

amendment to Section 209(b) has any bearing upon the issues here."

We agree with appellants that "The primary purpose of the 1957 amendments was to overcome the effect of this Court's decision in *United States v. Contract Steel Carriers*, 350 U.S. 409." However, it is equally true that the 1957 amendments also added to Section 209(b) the above-quoted criteria which the Commission must consider in granting or denying a contract carrier permit. As the court below stated (R. 79) "whatever may have been the original reason for instituting the legislation which culminated in the 1957 amendment, Section 209(b), as it read at the time the Commission issued this order, clearly directed consideration by the Commission of certain specific criteria in applying public interest and the national transportation policy to authorization of contract carrier permits."¹⁵ The Commission's order was entered on September 9, 1958, after the 1957 amendments to Section 209(b) became effective. It is settled that the Commission was required to comply with Section 209(b) as it read on the date of its decision. *Ziffrin v. United States*, 318 U.S. 73, 78.

Neither the Commission nor (contrary to the appellants' suggestion) the court below even suggested that the enactment of the specific criteria in Section

¹⁵ The court below found, and it is not denied here, that "The order here challenged shows on its face that the Commission did consider those criteria, making findings with respect to each of them" (R. 79).

209(b) was intended to "divorce from proceedings for new" permits under Section 209 the underlying policy of Section 5(2)(b). Rather, the Commission specifically held equally applicable to contract carrier applications under Section 209 the principles of *American Trucking Ass'n. v. United States, supra*, namely, "that the Congress did not intend the rigid requirement of Section 5(2)(b) to be considered as a limitation on certificates issued under Section 207", and "that the underlying policy of Section 5(2)(b) must not be divorced from proceedings for new certificates under section 207" (R. 29). And the court below specifically approved the Commission's view that where a rail affiliate applies for a contract carrier permit, it must take into account the policy underlying the proviso of Section 5(2)(b) as well as the specific criteria of Section 209(b) applicable to all proceedings for contract carrier permits (R. 82).

IV

The Commission's Action Is Consistent With the Dual Operations Provisions of Section 210 of the Interstate Commerce Act

Section 210 of the Interstate Commerce Act provides that "Unless, for good cause shown, the Commission shall find, or shall have found that both a [common carrier] certificate and [contract carrier] permit may be so held consistently with the public interest and the national transportation policy declared in this Act—" no person (or persons in a control relationship) shall hold both a contract carrier permit and a common carrier certificate "for the

transportation of property by motor vehicle over the same route or within the same territory." The appellants contend that the instant grant of contract carrier authority to PMT violates Section 210 because of (1) PMT's operations as a common carrier in the same territory, (2) the common carrier operations of Southern Pacific Transport Company,¹⁶ another subsidiary of the Southern Pacific Company, in Texas and Louisiana, and (3) the rail operations of PMT's rail parent. The Commission's extensive findings and discussion with respect to the appellants' contentions under Section 210 are found in its consolidated report on oral argument (R. 30-33) and in its prior report on one of the applications (R. 58-60) which was adopted in this respect in the later report (R. 31).

At the outset, it should be noted that Section 210 is not an absolute prohibition against the same person or affiliated persons performing both common and contract carrier service over the same route or within the same territory. Rather, such dual operations are permissible if approved by the Commission. As stated by the Chairman of the Senate Committee on Interstate and Foreign Commerce when the Motor Carrier Act was enacted in 1935,

* * * There are instances in which both types of operation [common and contract carriage] can advantageously be conducted by the same operator and without prejudice to the public interests,

¹⁶ The scope of this carrier's operations is described in the Commission's report (R. 31-32).

but the possibility of abuses developing makes it advisable to give the Commission the power to pass on all cases in which it is proposed to combine the two types of operation. (79 Cong. Record 5654).

The potential abuse involved in such dual operations is that where the same carrier provides both common and contract carrier service for the same shippers, it may charge some its common carrier rates while serving others at lower contract rates, a situation which may produce discrimination. *Dakota Transportation, Inc., Common Carrier Application*, 3 M.C.C. 621, 631 (1937).

In the present case, the Commission made the findings required by Section 210, namely, "that the holding by applicant of the permits granted herein and those heretofore issued, and of the certificates heretofore issued to it authorizing common carrier operations in the same territory, and the holding by Southern Pacific Transport Company of the certificates heretofore issued to it, will be consistent with the public interest and the national transportation policy" (R. 33). We submit that there was a rational basis for this finding.

As regards the possibility of PMT transporting new automobiles and trucks both as a common and as a contract carrier, the Commission noted in its prior report (R. 58) that "Most of the common carrier authority held by applicant is restricted against the transportation of automobiles and trucks, either specifically, or in the form of a restriction against the transportation of commodities requiring special

equipment." Nevertheless, in its later report (R. 32) the Commission provided that "our grants here will be made subject to the condition that applicant request in writing the imposition of a condition against the transportation of automobiles and trucks in its outstanding certificates * * * which are not specifically restricted against such transportation."¹⁷ PMT has complied with this condition. Thus, PMT is precluded from transporting automobiles and trucks in the dual operations contemplated by Section 210.

As noted above, the Commission also made the findings required by Section 210 as to the common carrier operations of Southern Pacific Motor Transport Company in Texas and Louisiana. However, since the company's common carrier operations are not conducted "over the same route or within the same territory" as the PMT contract carrier operations here involved, no dual operations issue under

¹⁷ The Commission has similarly conditioned the grant of certificates or permits in deference to Section 210 in a number of cases. See, e.g. *Martin Com. Carr. Application*, 10 M.C.C. 657, 662 (1938); *Kane Tfr. Co. Com. Carr. Application*, 12 M.C.C. 404, 407-8 (1939); *H. B. Church Truck Serv. Co. Com. Carr. Application*, 27 M.C.C. 191, 202 (1940); *Eastern Tptn. Co., Inc., Cont. Carr. Applic.*, 34 M.C.C. 389, 393-4 (1942); *DeVenne-Control-Allmen Tfr. & Moving Co.*, 65 M.C.C. 661, 664-5 (1956); *United Parcel Serv. Inc., Com. Carr. Applic.*, 68 M.C.C. 199, 205-6 (1956); *Cooper—Purchase—Transport Trkg Co.*, 70 M.C.C. 561, 562, 565 (1957); *Miller Transport Co., Inc. Extension—Groceries*, 72 M.C.C. 486 (1957); *Stang Cont. Carr. Applic.*, 73 M.C.C. 513, 518-9 (1957); and *Kane Tfr. Co., Extension—Groceries*, 73 M.C.C. 569, 571-3 (1957).

Section 210 is presented. See *Columbia Motor Transport Co. Common Carrier Application*, 46 M.C.C. 69, 93 (1946).

As the Commission noted in its prior report (R. 58), "the provisions of Section 210 of the Act are applicable only to instances involving the holding of certificates and permits authorizing the transportation of property by motor vehicle." In other words the Commission need not make the findings required by Section 210 where the dual operations consist of motor contract carrier and rail common carrier operations. However, the Commission added (R. 58) that "even without the statutory requirements, we would be remiss in our duty were we to ignore the dual relationship between applicant, as a contract carrier by motor vehicle, and the Southern Pacific Company, as a common carrier by rail. We may inquire into the relationship incidental to the statutory findings necessary under section 209 of the Act and in a proper case withhold a grant of authority or impose restrictions necessary to guard against the possibility of practices at which section 210 is aimed." And the Commission identified the problem as whether Southern Pacific-PMT should be permitted to serve GM as a motor contract and rail common carrier of new automobiles and trucks and as a common carrier both by rail and motor of general freight (i.e., inbound automotive parts) (R. 59).

In its prior report (R. 60), the Commission stated the reasons for its conclusion that "we properly may approve the resultant operations." It noted that "Applicant's past satisfactory performance in a

dual capacity has been without criticism." This is particularly significant in that Southern Pacific-PMT had for years performed such dual rail and motor service for GM. Next, the Commission pointed out that PMT would be serving only a single shipper in the contract carriage of automobiles. In other words, neither PMT nor Southern Pacific-PMT is in a position to provide both common and contract carrier service to a substantial number of shippers between whom it might practice the type of discrimination at which Section 210 is directed. Indeed, it was inherent in the instant situation that only competing automotive manufacturers could be injured by the dual operations of Southern Pacific-PMT in serving GM in either the outbound transportation of assembled automobiles and trucks or the inbound transportation of parts. While the appellants faintly suggest (App. br. p. 52) that Southern Pacific "could give preference to GM" over the Ford plant at Milpitas (near San Francisco), the past record of no discrimination, plus the ability of the Ford Motor Company to protect itself against such treatment, relegates this suggestion to sheer speculation which did not require the Commission to forbid such dual operations. Ford, the only other GM competitor which is served by Southern Pacific (R. 468), has not complained. These circumstances, coupled with its findings as to GM's need for the authorized contract carrier service, clearly provided a rational basis for the Commission's treatment of the dual operations issues. This basis was reinforced by the Commission's reservation of power (R. 32) "to reconsider this issue at any

future date should the present facts change so as to bring about an improper competitive situation or result in improper discrimination or preference." See *American Trucking Assn's v. United States*, 355 U.S. at 154.

Finally, we suggest that the appellant motor carriers and associations are wholly without standing to challenge the Commission's application of Section 210, which is directed at the protection of shippers, rather than competing motor carriers.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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